

***United States Court of Appeals
for the Second Circuit***



APPENDIX

75-6038

UNITED STATES COURT OF APPEALS
SECOND CIRCUITMABEL M. CASE,
d/b/a/ CASE NURSING HOME,Plaintiff,
Appellant,

B

-VS.-

SECOND CIRCUIT
DOCKET NO. 75-6038CASPAR WEINBERGER, as Secretary
of the United States Department of
Health, Education & Welfare;
BERNICE L. BERNSTEIN, as Regional
Director for Region II of the
United States Department of Health,
Education & Welfare; ALAN J.
SAPERSTEIN, Director, Office of
Long Term Care, Region II, HEW;
ABE LAVINE, Commissioner of the New
York State Department of Social
Services; and JOHN LASCARIS, Com-
missioner of the Onondaga County
Department of Social Services,Defendants,
AppelleesAPPENDIX -- VOLUME 2
Pp. A-64 -- A. 152

MICHAEL A. WINEBURG & JOSEPH C. SCOLLAN OF COUNSEL

MICHAELS, MICHAELS & WINEBURG

ATTORNEYS AND COUNSELORS AT LAW

410 METCALF PLAZA

P. O. BOX A

AUBURN, NEW YORK 13021

7

PAGINATION AS IN ORIGINAL COPY

MABEL M. CASE
d/b/a CASE NURSING HOME, and
LOUISE UNGARO,
d/b/a PHILLIPS NURSING HOME,

-against-

AFFIDAVIT

CHARLES A. GLESSING, being duly sworn, deposes and says:

(1) I reside at 210 Beechwood Avenue, Liverpool, New York

MICHAELS, MICHAELS
AND WINEBURG
ATTORNEYS AT LAW
410 METCALF PLAZA
AUBURN, NEW YORK

A64

(3) On or about March 31, 1975, the Case Nursing Home received a letter from the Department of Health, Education, and Welfare, advising that the requested waivers of provisions of the Life Safety Code would not be granted, and that the facility did not comply with federal standards for participation in the medicaid program.

(4) The letter further advised that the New York State Department of Health had been notified of the decision and was requested to take further appropriate action. The said letter is attached hereto as Exhibit A.

(5) By letter dated March 25, 1975, sent in an envelope postmarked April 8, 1975, the New York State Department of Social Services advised the Case Nursing Home that effective April 12, 1975, the Case Nursing Home would no longer be certified as a provider of skilled nursing facility services for Title XIX (medicaid) recipients in New York State.

(6) The letter further stated that the nursing home would be contacted by appropriate local social services districts to arrange for the transfer of medicaid recipients from the Case Nursing Home prior to May 12, 1975. Subsequent to said transfer, federal and state financial participation would not be available for care and services provided by the Case Nursing Home. A copy of said letter is attached hereto as Exhibit B, and a copy of said envelope is attached hereto as Exhibit C.

(7) Although I attempted to contact the Onondaga County Commissioner of Social Services, John Lascaris, subsequent to my

receipt of said letter, my efforts were unsuccessful. On April 17, 1975, I did reach Commissioner Lascaris, and the Commissioner advised me that as beds became available in other facilities, his Department would take appropriate action to remove the patients from the Case Nursing Home to other facilities.

(8) Commissioner Lascaris indicated to me that patients would be moved out, commencing the week of April 21, 1975.

(9) Before patients are actually transferred to other facilities, a public health nurse must screen them to determine the level of care required by each patient. A public health nurse has already begun screening the patients at the Case Nursing Home.

(10) The Case Nursing Home is certified by the State of New York for twenty-one beds. All twenty-one beds are currently occupied.

(11) The income generated by both private patients and medicaid patients is approximately \$11,000.00 per month.

(12) At the present time, of the twenty-one patients, eighteen patients are medicaid patients, and the medicaid payments to the nursing home total approximately \$9,700.00 each month. The additional three private patients generate the balance of the revenue to the nursing home each month.

(13) The Case Nursing Home employs twenty-two persons, with an average monthly payroll of \$6,400.00.

(14) In addition, the nursing home has monthly expenses for medical supplies, food, and other general operating expenses totaling approximately \$3,800.00.

(15) Over the past sixteen months during which I have been Administrator of the Case Nursing Home, there have been occasions when there has been a waiting list of private patients. At the present time, there is no waiting list of private patients. The only calls which we have received concerning inquiries about available beds have been for medicaid patients, and we receive those calls from the Onondaga County Department of Social Services each week.

(16) If we were to lose our medicaid patients and were unable to place additional medicaid patients in the facility as beds became available, the nursing home could not function as a profitable business. The nursing home, for lack of income, would be forced to close.

(17) The Case Nursing Home has been in the same location for at least thirty-eight years, and has always been owned by members of the Case family.

1st Charles A. Glessing
Charles A. Glessing

Sworn to before me this 18 day of
April, 1975.

1st Michael A. Winchberg
Notary Public

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

MABEL M. CASE
d/b/a CASE NURSING HOME, and
LOUISE UNGARO,
d/b/a PHILLIPS NURSING HOME,

Plaintiffs,

-against-

CASPAR WEINBERGER, as Secretary of the United States Department of Health, Education & Welfare; BERNICE L. BERNSTEIN, as Regional Director for Region II of the United States Department of Health, Education & Welfare; ALAN J. SAPERSTEIN, Director, Office of Long Term Care, Region II, HEW; ABE LAVINE, Commissioner of the New York State Department of Social Services; and JOHN LASCARIS, Commissioner of the Onondaga County Department of Social Services,

Defendants.

AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF CAYUGA) SS.:

MICHAEL A. WINEBURG, being duly sworn, deposes and says:

(1) I am a member of the firm of Michaels, Michaels & Wineburg, attorneys for the plaintiffs herein, and am duly admitted to practice before this Court.

(2) Since the fall of 1972, I have been involved personally in numerous state and federal proceedings concerning these two nursing homes.

(3) After the Second Circuit decision in Maxwell v. Wyman, 458 F.2d 1146(2d Cir. 1972) the Phillips Nursing Home was afforded the so-called Maxwell hearing by the New York State

Department of Social Services. By decision of the Commissioner, dated December 20, 1972, the Commissioner decided that the nursing home was not entitled to waivers of the pertinent provisions of the Life Safety Code, 1967 Edition.

(4) A review of said determination was had in the Appellate Division, Third Department, sub nom. Matter of Pollock v. Lavine, 41 App. Div. 2d 352 (3d Dep't. 1973).

(5) The Court in that decision stated, in effect, that the expert of the Phillips Nursing Home stated that certain alterations should be made to make the nursing home safe. Since there was no proof as to whether or not the repairs had been made, the Court withheld decision and remitted the matter for further development of the record. An order was entered on June 12, 1973.

(6) There was no remission. On or about July 1, 1973, the new federal regulations were introduced, making determinations on waivers, a Federal matter.

(7) Subsequently, the Attorney General of the State of New York moved to vacate the Court's order of June 12, 1973, and the Appellate Division, Third Department vacated the order, holding that, in view of the new federal scheme, further state procedures were of an academic nature.

(8) The Case Nursing Home had a purported hearing in the fall of 1972. At that hearing, there was no hearing officer present, and none of the testimony was under oath. Rather than proceed through an Article 78 proceeding, the Attorney General

A69

stipulated to a new hearing.

(9) That hearing came shortly before the July, 1973 regulations were promulgated, and there has been no decision therefrom.

(10) Since the time of the hearings in 1973, with the exception of the action in the Appellate Division, referred to previously, there has been no further action taken, concerning the enforcement of the Life Safety Code or waivers of specific provisions thereof, until October, 1974.

(11) In October, 1974, the Department of Health, Education and Welfare sent a letter to each of the nursing homes, advising that based upon surveys of the New York Health Department, the HEW Regional Office of Long Term Care Standards Enforcement made a recommendation that the facility is not entitled to waivers. A copy of the letter with reference to the Phillips Nursing Home is attached hereto as Exhibit A.

(12) The letter stated that the nursing home could request a review before the program director of the Office of Long Term Care Standards Enforcement prior to the Director's making a determination.

(13) Responses requesting such a review were made in connection with both of the nursing homes, and on December 17, 1974, the "reviews" were held at the Federal Plaza, New York, New York.

(14) The procedures and guidelines to be followed were set forth in a letter from the Department of Health, Education &

A70

Welfare dated November 12, 1974. A copy of said letter is attached hereto, as Exhibit B.

(15) Prior to the commencement of the informal meeting in New York, I spoke with Morton Berkowitz, the gentleman presiding at the meeting, and twice during our conversation, he referred to the "review" as a "hearing."

(16) In my introductory remarks, I made reference to the "hearing" statements by Mr. Berkowitz, and stated that the nursing homes believed that hearings were required. Nevertheless, since the only procedure available, insofar as the Department of Health, Education and Welfare was concerned, was this so-called "review," we proceeded.

(17) During the review, to the best of my recollection, we offered statements from James Regan, our fire safety consultant and expert. We also offered, during the meeting, to send in proposed plans of alterations. We were advised that on an initial level, the plans should not be formal architectural drawings. If necessary, they could and would be supplied at a later time.

(18) Because of my concern with the procedure to be followed, I inquired into same. To the best of my recollection, without a transcript of the tape recording of the meeting, there was to be a "give and take" between the nursing home and the Department of Health, Education and Welfare. If our proposed plan did not satisfy the requirements of the Department of Health, Education and Welfare's engineers, we would be advised and would attempt to work together to work out a suitable plan.

(19) By letter dated January 20, 1975, we did submit plans. A copy of the letter of transmittal is attached hereto, as Exhibit C.

(20) The next communication from the Department of Health, Education and Welfare concerning these homes was a letter advising that the nursing home, as a result of promised corrections, would not comply with the equivalent fire safety standards necessary for the office of the Regional Director to find that the safety of patients is not in jeopardy. The letters, copies of which is attached hereto, as Exhibits C¹ & C², stated that even if the plans were implemented, the facilities would not meet the requirements of the Code in certain respects.

(21) As a result, the Department determined that the requested waivers could not be granted and that the facility does not comply with federal standards for participation in the Medicaid Program. The letters also advised that the New York State Department of Health would be notified of the decision and requested to take appropriate action.

(22) Upon my receipt of the letter of the Case Nursing Home, on March 31, 1975, I called Annette Blum, one of the attorneys in the Regional Office. I asked her, first of all, why we were not given the opportunity to have additional meetings with the engineer, why we received no additional communications, and why the stated procedure to be followed was not followed. Secondly, I stated that according to the letter, dated March 25, 1975, there were correctable items which we would be willing to fulfill. For example, I told Mrs. Blum that with respect to

patient room doors, it would certainly be expensive to widen the doors to the required 40 inches, but that expense should be our decision, if we were willing to offer such a widening.

(23) I further pointed out that we did ask for a waiver of this provision of the Life Safety Code, but that our earlier letters made it absolutely clear that we were willing to accept any suggestions of the Department.

(24) Mrs. Blum did call me back, stating that she had played the tape and that there was an indication that there would be some give and take. She further stated that she had talked to some person in the Department, and the feeling was that even if some or all of the things set forth in the letter were taken care of, the nursing home would still be a building which they could not accept and issue waivers on. Mrs. Blum suggested that I contact an Ann Marie Schmitt, in the office of Long Term Care, and after a discussion with Mrs. Schmitt, she suggested that I talk to Alan J. Saperstein, the Director of the Office of Long Term Care.

(25) Two days later, I was able to discuss the situation with Mr. Saperstein. He advised that he had called his engineers together and they said, basically, that no matter what the Case Nursing Home did, the facility would not be such that they would grant waivers.

(26) On April 11, 1975, with the knowledge that this office would commence proceedings within a relatively short time,

A73

I called Annette Blum in the Regional Office of the Department of Health, Education & Welfare to confirm a number of facts and to seek a clarification of the position of the Department of Health, Education & Welfare.

(27) I did inform Mrs. Blum that we would be commencing proceedings, and, also advised her during the course of the telephone conversation, that another attorney in our office, Joseph C. Scollan, was on the phone.

(28) During that telephone conversation, Mrs. Blum did confirm that the following were the Department's positions:

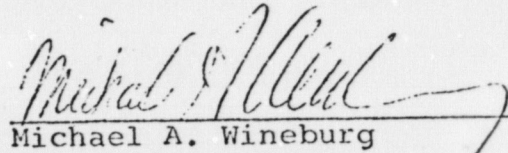
- (a) That no hearing was required or available.
- (b) That the only review available was the informal meeting referred to above.
- (c) There are no review or reconsideration procedures available to review or reconsider letters indicating that requested waivers would not be granted.
- (d) That the position of the Department in the Poskanzer case was the position of the Department in this case.

(29) Upon information and belief, the Department's position in the Poskanzer case is as follows: the facility is a Medicaid provider and not a Medicare provider; that the conditions for participation in the two programs are identical; that administrative due process regulations are available only to Medicare providers in the event of a decision not to grant waivers and are not available to Medicaid providers; that the facility is not entitled to a hearing; upon decertification by letter, the facility is not entitled to a review of the decision.

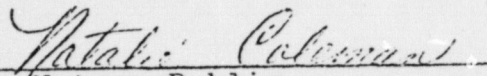
A74

(30) A copy of my letter of confirmation to Mrs. Blum of April 11, 1975 is attached hereto as Exhibit D.

(31) A copy of Mrs. Blum's response of April 15, 1975 is attached hereto as Exhibit E.


Michael A. Wineburg

Sworn to before me the 18th day
of April, 1975.


Notary Public
#1384 Comm. Expires March 1977.

U. S. DISTRICT COURT
N. D. OF N. Y.
FILED

MAY 7 - 1975

AT O'CLOCK M.
J. R. SOULLY, Clerk
AUBURN

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

MABEL M. CASE,
d/b/a CASE NURSING HOME, and
LOUISE UNGARO, d/b/a
PHILLIPS NURSING HOME,

Plaintiffs,

-against-

CASPAR WEINBERGER, as Secretary
of the United States Department of
Health, Education & Welfare;
BERNICE L. BERNSTEIN, as Regional
Director for Region II of the
United States Department of Health,
Education & Welfare; ALAN J.
SAPERSTEIN, Director, Office of
Long Term Care, Region II, HEW;
ABE LAVINE, Commissioner of the New
York State Department of Social
Services; and JOHN LASCARIS, Com-
missioner of the Onondaga County
Department of Social Services,
Defendants.

AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF BRONX) SS.:

JAMES P. REGAN, being duly sworn, deposes and says:

(1) I currently reside at 3410 Kingsbridge Road, Bronx, New York.

(2) I am, by profession, a fire safety consultant. I am the fire safety consultant of the New York State Nursing Home Association, the Mid-Hudson Nursing Home Association, the Westchester County Nursing Home Association, the Metropolitan Nursing Home Association, the Association of Private Hospitals in New York City, and the Greater New York Hospital Association. In

RICHARD S. MICHAELS
AND WHITTING
ATTORNEYS AT LAW
410 EIGHTH FLAVIA
AUBURN, NEW YORK

A76

addition, I am special consultant, through counsel, to approximately twelve fire insurance companies.

(3) I have and continue to conduct fire safety seminars for administrators of facilities at Ithaca College and other educational institutions.

(4) Prior to my becoming a fire safety consultant, I was the chief of the Division of Fire Prevention, New York City Fire Department, for the boroughs of Brooklyn and Queens. I also sat on the Fire Commissioner's Board of Fire Prevention Regulations. I was a member of the Life Safety Code Committee of the National Fire Protection Association 101.

(5) I am thoroughly familiar with the Life Safety Code, NFPA NO. 101, 1967 Edition, and I am also very familiar with the Case Nursing Home, 119 Kirk Avenue, Syracuse, New York, and the Phillips Nursing Home, 714 West Onondaga Street, Syracuse, New York.

(6) My initial contact with the Phillips Nursing Home was in 1972, when I inspected same in order to testify at a "Maxwell" Hearing. At that hearing, I testified that the operator, Mrs. Louise Ungaro, installed a manually operated fire alarm system, inter-connected with the sprinkler system, placed detection heads in the corridors, to connect with the sprinkler and interior alarms, and completed a third exit, that the nursing home would be reasonably safe for the occupants thereof.

(7) On the 8th day of May, 1973, I again viewed the exterior and interior of the Phillips Nursing Home. Upon my driving into the driveway of the Phillips Nursing Home, I noticed that the work for the third exit, referred to above, had been completed.

(8) In the interior of the nursing home, I found a manual alarm system. The main box was located on the first floor of the nursing home, and pull stations were located throughout the home.

(9) Additionally, I viewed products of combustion detectors located in the corridors of the first and second floors, attic, and cellar. I had recommended only that smoke detectors be put in the home. Products of combustion detectors, in my opinion, superior to smoke detectors, exceeded my recommendations. All of the systems inter-connected and connected with an ADT System.

(10) On May 21, 1973, I swore to an affidavit, stating that I was of the opinion that based upon my inspection and previous opinion, the Phillips Nursing Home was reasonably safe for the occupants thereof; that the granting of any waivers for the Phillips Nursing Home would not adversely affect the health and safety of the patients.

(11) In connection with the Case Nursing Home, I also viewed the Case Nursing Home during the late winter of 1973. I testified at a hearing at the New York State Department of Health, South Salina Street, Syracuse, New York, and based upon my inspection

of the premises, I offered an opinion that the Case Nursing Home, also a fully sprinklered facility with interconnection of systems, was reasonably safe for the occupants and that the granting of waivers would not adversely affect the health and safety of the patients, from a fire safety standpoint.

(12) Pursuant to the request of Michael A. Wineburg, the attorney for the Phillips Nursing Home and the Case Nursing Home, I again came to Syracuse in November, 1974. At that time, I came specifically to inspect the homes in connection with a meeting to be held with the two nursing homes in the Department of Health, Education and Welfare, Federal Plaza, New York, New York, on December 17, 1974. During my inspection, I had a list of alleged violations prepared by the Department of Health, Education and Welfare.

(13) I did review those violations and did inspect the homes on November 26, 1974, and notwithstanding any of the alleged violations, my opinion did not change that both nursing homes were reasonably safe and that the granting of waivers of the alleged deficiencies of the life safety code would not adversely affect the health and safety of the patients.


(14) At the meeting in New York, on December 17, 1974, I did discuss my findings, recommendations and opinions with those present. It was my opinion that there were changes that could be made to both of the nursing homes which would make them more complying technically, with the life safety code of 1967 and, I believe that an offer to make those changes was made.

- 4 -

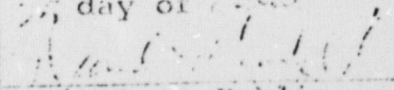
(15) Prior to January 20, 1975, Mr. Wineburg sent to me a set of proposed alterations to each of the two nursing homes. I reviewed those plans, and advised Mr. Wineburg that the plans met my approval.

(16) I believe that with the completion of the plans as outlined, there would be greater technical compliance with the life safety code. It is, nevertheless, my opinion that these nursing homes, without the execution of those plans, are reasonably safe and that the granting of waivers would not adversely affect the health and safety of the patients.

(17) I am making this affidavit at the request of Michael A. Wineburg. It is my understanding that this affidavit may be submitted in support of an application for an order restraining the removal of patients from these two nursing homes pending administrative hearings concerning life safety code compliance and waivers. Because of the opinions I have already expressed in this affidavit, I am also of the opinion that during the time period of such restraint, pending such hearings if granted, the lives of the patients in these nursing homes would not be placed in jeopardy.


JAMES P. REGAN

Sworn to before me this
26 day of April 1975.


Notary Public

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

MABEL M. CASE, d/b/a CASE NURSING HOME, and
LOUISE UNGARO, d/b/a PHILLIPS NURSING HOME,

Plaintiffs,

- against -

CASPAR WEINBERGER, as Secretary of the
United States Department of Health Educa-
tion & Welfare; BERNICE L. BERNSTEIN, as
Regional Director for Region II of the
United States Department of Health, Edu-
cation & Welfare; ALAN J. SAPERSTEIN,
Director, Office of Long Term Care, Region
II, HEW; ABE LAVINE, Commissioner of the
New York State Department of Social Ser-
vices; and JOHN LASCARIS, Commissioner of
the Onondaga County Department of Social
Services,

Defendants.

: AFFIDAVIT IN
: OPPOSITION

: 75-CV-134

STATE OF NEW YORK)

) ss.:

COUNTY OF ALBANY)

JOHN M. DUFUR, being duly sworn, deposes and says:

1. I am an Assistant Attorney General of the State
of New York, representing defendant Abe Lavine, Commissioner
of the New York State Department of Social Services.

2. I am familiar with the facts and circumstances
set forth herein, and make this affidavit in opposition to
the relief sought by plaintiffs in the order to show cause
herein.

3. Plaintiff Mabel M. Case is the owner and operator
of the Case Nursing Home located in Syracuse, New York.
Plaintiff Louise Ungaro is the owner and operator of the
Phillips Nursing Home also located in Syracuse, New York.

4. Case Nursing Home and Phillips Nursing Home are two of approximately 148 such homes now known as "Maxwell Nursing Homes". The name derives from a class action, Maxwell v. Wyman, initiated in the United States District Court, Northern District of New York, against the Commissioners of the State Departments of Social Services and Health, and the Secretary of the United States Department of Health, Education and Welfare (HEW). The nursing homes involved in that action had been found by Social Services and Health to be structurally unfit to continue as providers of services under the federally assisted Medicaid program [Title XIX, Social Security Act (42 U. S. C. § 1396 et seq.)) by virtue of violations of the Life Safety Code of the National Fire Protection Association (21st Ed., 1967). The main thrust of the complaint therein involved the decertification of the homes from participation in the federal program without having been afforded a hearing by the State officials.

5. On April 13, 1972, the United States Court of Appeals for the Second Circuit, in that case (Maxwell v. Wyman, 458 F. 2d 1146), ordered that hearings be held by the State to determine whether any of the nursing homes within the class would be entitled to a waiver of the structural deficiencies under applicable State and Federal regulations.

6. Pursuant to that order, plaintiffs were afforded hearings. After reviewing the evidence and exhibits adduced at the hearings, the hearing officers' reports and the Commissioner of Health's recommendations, the Commissioner of Social Services determined that no waiver of the Life Safety Code was warranted.

7. Plaintiffs sought judicial review of the determinations in State court. The proceeding commenced by plaintiff Case resulted in a stipulation of discontinuance and the holding of a new hearing. The proceeding commenced by plaintiff Ungaro resulted in an order by the Appellate Division, Third Department, sub nom William Pollock d/b/a Cedar Hedge Nursing Home v. Abe Lavina, 41 A D 2d 346 (3d Dept., 1973), remanding the matter to defendant for further development of the record.

8. Public Law 92-603, § 246 [42 U. S. C., § 1395x(j)(13), § 1396a(a)(28)], effective July 1, 1973 eliminated the State's authority to grant waivers of Life Safety Code deficiencies. That power now rests with the Secretary of HEW. HEW has implemented this statutory amendment by regulations published on August 8, 1973 and January 17, 1974, 45 C. F. R., § 249.33(a)(1)(vii). In addition, HEW has established procedures for review by it prior to reaching a final determination regarding waiver or non-waiver of Life Safety Code deficiencies.

9. In view of the uncertainty created by the statutory amendment with respect to the nursing home litigation still pending in State courts, defendants moved in federal court in Maxwell v. Wyman, supra, to vacate that court's order based on the change in federal law.

10. By order dated May 3, 1974, United States District Judge Edmund Fort ordered that the injunction, supra, be terminated as to all members of the Maxwell class except those in which a State administrative hearing had been afforded and there was presently pending unresolved judicial proceedings in State courts. As to each member of the excepted class, the injunction was to automatically terminate upon an initial determination by the Secretary of HEW pursuant to the change in federal law.

11. Thereafter, Social Services and Health moved in State courts to vacate the order of remand and dismiss the proceeding commenced by plaintiff Ungaro. The motion was grounded on the assertion that the change in federal law rendered any state hearing meaningless since such a hearing could not result in a final determination, only a recommendation to HEW. The Appellate Division, Third Department, granted the motion, vacated its earlier order and dismissed the proceeding as moot and academic. (Copy of the decision attached as Appendix "1".)

12. As required by the regulations published by HEW, implementing the change in federal law, 45 C. F. R. § 249.33(a), the Department of Health surveyed the homes and made recommendations to HEW regarding waiver of Life Safety Code deficiencies found therein. With regard to plaintiffs' homes, the recommendations were that waiver not be granted.

13. HEW conducted a review at which plaintiffs and their representatives were present. Thereafter, HEW notified both the homes and the Health Department that it denied waiver of Life Safety Code deficiencies found to exist in

A84

the homes and directed Health to take appropriate action.

14. Pursuant to 45 C. F. R. § 249.33(a) Health notified Social Services of HEW's decision to decertify plaintiffs' homes.

15. The State Department of Social Services then notified plaintiff Case and defendant Lascaris that Case Nursing Home had been decertified by HEW, advised them that federal and state financial participation would terminate at a specified later date as provided in 45 C. F. R. § 249.10 (b) (4) (i) (b), and that the Medicaid patients in the home must be transferred to properly certified facilities.

16. I have been advised by staff of defendant Lavine that a letter dated April 24, 1975 will be sent to plaintiff Urgaro. (Copy attached hereto as Appendix "2".)

17. The directives issued by defendant Lavine referred to in paragraphs 15 and 16, supra, were necessitated by the decision of HEW to decertify plaintiffs' homes and are in accord with federal law and regulations.

WHEREFORE, defendant Lavine respectfully requests that the Court deny the relief sought in the order to show cause and for such other and further relief as to the Court seems just and proper.

s/ John M. Dufur

Sworn to before me this
24th day of April, 1975.

Notary Public

ADELE E. BOGOSKI
Notary Public, State of New York
County of Westchester
My Commission expires March 30, 1976

A85

Supreme Court—Appellate Division
Third Judicial Department

445
November 20, 1974

20521 - In the Matter of LOUISE UNGARO, Doing Business As
Phillips Nursing Home, Petitioner,

v.

ABE LAVINE, as Commissioner of the Department of Social
Services of the State of New York, et al., Respondents.

Motion granted, without costs. Order entered June 12,
1974, vacated, and proceeding dismissed as academic. Dis-
missal of the proceeding in this Court, as academic, would
not appear to prejudice petitioner since a prior order of the
United States District Court, dated May 3, 1974, requires the
continuance of the reimbursement in question until a deter-
mination on the waiver issue is made by the Secretary of the
Department of Health, Education and Welfare.

STALEY, JR., J. P., COOKE, SWEENEY, KANE and MAIN, JJ., concur.

APPENDIX "1"

A 86

April 24, 1975

Mrs. Louise Ungaro, Administrator
PHILLIPS NURSING HOME
714 West Onondaga Street
Syracuse, New York 13204

Dear Mrs. Ungaro:

We have been notified by the State Health Department that PHILLIPS NURSING HOME was denied a waiver of Life Safety Code requirements by Region II, Department of Health, Education and Welfare. Under Federal law and regulations this decision denying waiver renders PHILLIPS NURSING HOME in noncompliance with the standards for certification and participation in the New York State Medical Assistance (Medicaid) Program.

Therefore, effective May 1, 1975, PHILLIPS NURSING HOME is no longer certified as a provider of skilled nursing facility services for Title XIX (Medicaid) recipients in New York State.

You will be contacted by the appropriate local social services districts to arrange for transfer of their respective Medicaid (Title XIX) recipients from your facility prior to May 31, 1975. Thereafter, Federal and State financial participation will no longer be available for care and services provided in your facility.

Sincerely,

Beverine A. Myers
Deputy Commissioner
DIVISION OF MEDICAL ASSISTANCE

(BAM/AF:ad)

cc: B. Myers' copies (2)
A. Farley Daybook
Form Letter File

nh file

APPENDIX "2"

A87

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

----- X
MABEL M. CASE,
d/b/a CASE NURSING HOME,
and LOUISE UNCARO,
d/b/a PHILLIPS NURSING HOME,

Plaintiffs

-against-

CASPAR WEINBERGER, as Secretary of the
United States Department of Health,
Education and Welfare; BERNICE L. BERNSTEIN,
as Regional Director for Region II
of the United States Department of Health,
Education and Welfare; ALAN J. SAPERSTEIN,
Director, Office of Long Term Care,
Region II, HEW; ABE LAVINE, Commissioner of
the New York State Department of Social
Services; and JOHN LASCARIS, Commissioner
of the Onondaga County Department of Social
Services,

Defendants
-----X

: Affidavit

: 75 Civ 184

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss:

ALAN J. SAPERSTEIN, being duly sworn deposes and says that:

1. He is Director, Office of Long Term Care Standards Enforcement, Region II, Department of Health, Education, and Welfare, and as such is the officer charged with making the determinations as to whether pursuant to Federal law, waivers of deficiencies of the NFPA Life Safety Code may be granted to skilled nursing facilities participating in the Federal program of Medical Assistance to States under Title XIX of the Social Security Act (Medicaid).

2. He is familiar with the matter of the request of Case Nursing Home for waiver of the Life Safety Code deficiencies found at this home, and makes this affidavit with on the basis of either personal knowledge, or official records contained in files in his possession and custody.

3. On November 14, 1973, Donald G. Dickson, M.D., Deputy Commissioner of the New York State Department of Health, sent a letter to Bernice L. Bernstein Regional Director, Department of Health, Education and Welfare Region II, advising her that under the delegation of waiver authority (P.L. 92-603) to

A88

DHEW, the Department of Health had enclosed its fire safety survey findings and waiver recommendations for waivers of the Life Safety Code (N.F.P.A. 21st edition, 1967) for those 19 facilities that had contested Health's findings and certification decisions.

4. Included in the said communication were a state fire safety survey report and a waiver denial recommendation for the Case Nursing Home, Syracuse, New York (hereinafter "Case").

5. The State's justification for the negative recommendation for Case, as enumerated on Form SNF-1, was as follows: We do not recommend waiver of any deficiency because the structure does not meet Life Safety Code Standards primarily in the following respects: Building Construction Type (10-1322); Required Exits (10-2211/12), Corridor Width (10-2233).

6. According to procedures operational at that time, the package was routed to DHEW, Facilities Engineering and Construction Agency (FECA) Regional Office through William D. Zerby, then Chairman of the Long Term Care Committee, for an expert review and recommendation.

7. As a result of the FECA review, Emilio Pucillo, A.I.A., Chief of Design and Engineering, FECA, concurred with the State's negative findings. His justification for waiver denial recommendation, as enumerated on form SNF-1, and dated December 26, 1973, was that waivers of the Life Safety Code should not be granted since the facility had intervening rooms between corridors and exits, non-conforming patient room doors, stairs that are not Class A or B, no emergency lighting, no fire alarm system, and some sleeping rooms without doors leading directly to a corridor.

8. Based on the FECA recommendation, a decision was reached to deny waivers of the Life Safety Code to Case. This decision was communicated to Frank T. Cicero, M.D., Assistant Commissioner, New York State Department of Health by Bernice L. Bernstein, Regional Director, DHEW, Region II in a letter dated January 9, 1974.

9. On January 15, 1974, William D. Zerby, Chairman of the Long Term Care Committee, advised Mrs. Mabel M. Case, owner of the facility, of the DHEW decision and requested that Mrs. Case submit any comments or additional evidence

A89

10. In a letter dated January 21, 1974, Mrs. Case advised William D. Zerby, DHEW, that, in her opinion, the facility had taken all safety precautions to ensure the well being of its patients and that the facility's net profits had decreased due to implementation of fire safety precautions. As a result, Mrs. Case requested a waiver of existing Life Safety Code deficiencies.

11. Frank T. Cicero, then Associate Commissioner, New York State Department of Health, in a letter dated September 17, 1974, to deponent, inquired as to whether the Department's original determination regarding Case had been reconsidered or revised.

12. As a result of this communication, a review of the matter of the Case Nursing Home was initiated. Deponent, in order to grant the facility every consideration, requested that a federal engineer personally conduct an on-site fire safety survey of the facility.

13. Deponent, in a letter dated November 5, 1974 to Mrs. Case, advised that after careful consideration of all the evidence, his staff had recommended denial of waiver of Code deficiencies. Mrs. Case was supplied with copies of the state and federal fire safety survey reports which were the basis of the staff recommendation. Mrs. Case was further advised that a review of the staff recommendation was available upon request, that she could be represented by counsel at such a review, and that she would have the opportunity to present evidence and testimony on the facility's behalf.

14. In a letter dated November 9, 1974, Charles A. Glessing, administrator of the facility, advised the DHEW office of the Regional Attorney that a review of the staff recommendation to deny waiver was requested.

15. The review presided over by Morton C. Berkowitz, Staff Office and designee of deponent, was held on December 17, 1974. The review was held for Case as well as the Phillips Nursing Home at the request of the facilities' counsel. The principal participants were Mr. Berkowitz, Ms. Annette Blum, Assistant Regional Attorney, Mr. B. Parodi, FECA, DHEW, Mr. Bernard Sullivan, New York State Department of Health, Mr. Michael A. Wineberg, counsel for the facilities, and Mr. James Regan, fire safety expert for the facilities. During

A90

the review, which was recorded on tape, Messrs. Wineberg and Regan offered testimony on behalf of the facilities and had the opportunity to question the state and federal representatives responsible for the adverse recommendation.

16. As had been agreed upon during the review, Michael Wineberg, in a letter dated January 20, 1975 to Annette Blum, submitted for deponents review a plan outlining the corrections which the facilities would make in an attempt to comply with standards required by the Life Safety Code and those areas where waiver was requested.

17. This information was transmitted to FECA for final review and recommendation on January 28, 1975. In a communication to deponent dated March 13, 1975, FECA advised that, regardless of the elimination of correctable deficiencies, Case could not meet the standards required by the Code, or their equivalent.

18. In light of this information, and a thorough review of all other information submitted during and subsequent to the December 17, 1974 review, deponent, in his capacity as Director, Office of Long Term Care Standards Enforcement, on March 25, 1975, advised Frank T. Cicero, New York State Department of Health, that waivers of the Life Safety Code had been denied to the Case Nursing Home and that appropriate action should be taken by the state agencies. This decision was simultaneously conveyed to the facility, and counsel for the facility.

19. Deponent subsequently received a copy of a communication from the New York State Department of Social Services to Mrs. Case advising that the facility would be decertified as a Medicaid provider of Skilled nursing facility services effective April 12, 1975 and that federal and state financial participation would be unavailable for services rendered subsequent to May 12, 1975.

Sworn to before me
this _____ day of
April, 1975

Notary Public

ALAN J. SAPERSTEIN
Director
Office of Long Term Care
Standards Enforcement

A91

November 12, 1974

Our Reference: OC:RA II:AB

Michaels, Michaels & Winzburg
Attorneys and Counselors at Law
Metcalfe Plaza
Post Office Box A
Auburn, New York 13021

Re: Phillips Nursing Home
Syracuse, New York

Dear Mr. Winzburg:

As you are aware, the staff of the NEW Long Term Care Standards Enforcement regional office has made a recommendation that the subject facility does not meet the NFPA Life Safety Code of 1967 as required by Federal law, and is not entitled to a waiver of the provisions of the code. Under the procedures adopted by the regional office, before such recommendation is adopted, a review is available to permit the facility to present any facts which it believes may be relevant. The review which you have requested will be held on December 18, 1974 at 1:00 p.m.. The following procedure will be followed at that time:

1. Presiding at the review will be the regional long term care director. Present will be representatives of the State Department of Health, and the Regional Office of NEW, who were involved in the recommendation that the facility in question does not meet the provisions of the NFPA Life Safety Code of 1967 as required by Federal law, and, that it is not entitled to a waiver of such provisions of the code. Also present will be a representative of the DHEW Office of Regional Attorney. The facility may be represented by counsel.
2. The facility will have the opportunity to be heard, i.e., will have the opportunity to present evidence on whether the nursing home meets the ~~LIFE SAFETY CODE~~ provisions or is entitled to waiver.
3. The proceeding will ~~be recorded~~ ^{be recorded} and a record placed within the room.

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A92

4. If the facility or its representative raises any contention that the State survey report or the documentation of HEN staff may be based on erroneous factual findings, the facility may ask the State or HEN personnel involved to explain the statements made. However, the regional program director reserves the right to limit questioning where the purpose appears to be harassment.
5. It is anticipated that each review shall take no more than two hours.

You should already have received copies of surveys setting forth the deficiencies found by the survey agency.

If you have any questions concerning the foregoing, please feel free to contact me by letter, or by telephone at 212/264-3822.

Sincerely yours,

Borge Varnier
Regional Attorney

BY:

Annette Blum
Assistant Regional Attorney

ABLum:pb
cc: Alan Saperstein, LTC
Mr. Galen Powers

A93

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

MABEL M. CASE
d/b/a CASE NURSING HOME,
and LOUISE UNGARO,
d/b/a PHILLIPS NURSING HOME,

Plaintiffs,

- against -

75 Civ 184

CASPAR WEINBERGER, as Secretary of the
United States Department of Health,
Education and Welfare; BENJAMIN L. DEWITTE,
as Regional Director for Region II
of the United States Department of Health,
Education and Welfare; ALAN J. SAPERSTEIN,
Director, Office of Long Term Care,
Region II, NEW; ABE LAVINE, Commissioner of
the New York State Department of Social
Services; and JOHN LACARIS, Commissioner of
of the Onondaga County Department of Social
Services,

Defendants.

CERTIFICATION

I, Morton C. Berkowitz, Staff Officer, Office of Long Term Care
Standards Enforcement, Department of Health, Education and Welfare,
hereby certify that the documents annexed hereto constitute an accurate
transcript of the record of proceedings relating to the application of
Case Nursing Home for waiver of Life Safety Code deficiencies, such
transcript including survey reports, testimony and other evidence upon
which the decision of the Director of the Office of Long Term Care
Standards Enforcement was based.

Date: May 1, 1975

Morton C. Berkowitz
Morton C. Berkowitz

A94

DEPARTMENT OF HEALTH, EDUCATION & WELFARE
OFFICE OF LONG TERM CARE
REGIONAL OFFICE 2

-----X

PHILLIPS NURSING HOME

-and-

CASE NURSING HOME

-----X

December 17, 1974

P R E S E N T :

DEPARTMENT OF HEALTH
EDUCATION & WELFARE:

Mr. Berkowitz
Ms. Bloom
Mr. Pachillo
Ms. Schmidt

NEW YORK STATE DEPARTMENT
OF HEALTH

Mr. Sullivan
Mr. Sharpe

PHILLIPS NURSING HOME

Mrs. Louise Sangaro

CASE NURSING HOME

Mr. Charles Glossing

ATTORNEY FOR
PHILLIPS NURSING HOME

-and-

CASE NURSING HOME

Mr. Michael Weinberg

ADLER REPORTING SERVICE
STENOTYPE REPORTERS
15 PARK ROW
NEW YORK, N.Y. 10038

CORLAND 7-3343
CORLAND 7-3339
NIGHT PHONE 233-3151

TRANSCRIPT

A95

BERKOWITZ: We are here today for a review proceeding requested by Phillips Nursing Home and the Case Nursing Home, in order to enable the homes to present any evidence they may have in regard to whether or not these homes should be granted a waiver of specific provisions of the NFPA Life Safety Code.

The staff of the Region 2 Office of Long Term Care Standards Enforcement has reviewed survey reports made by the State Department of Health and the HEW Regional Office of the Facilities Engineering & Construction Agency. On the basis of these reports and other relevant material the staff has recommended to me that waiver be denied.

At this time in order that I may make a determination as to waiver, I would like to hear whatever factual evidence these homes may have that bears on the issues of the Life Safety Code deficiencies.

The survey reports setting out these deficiencies have been made available to the homes

A96

prior to this proceeding and will be made part of the record herein.

The facilities will now have the opportunity to present evidence on whether they meet the Life Safety Code provisions or are entitled to waivers from the provisions with which it appears they are not in compliance.

The facility or its representative may ask questions of the State survey agency personnel present or of the HEW personnel present.

As presiding officer I reserve the right to limit questioning where the purpose appears to be out of order.

This proceeding will be recorded by tape recorder and the tape made will be available to the facility or counsel for reproduction, if requested.

I would like everyone to state their name and affiliation for the record.

I am Morton Berkowitz, Staff Officer, Office of Long Term Care, and I will be the presiding officer at this hearing.

~~A97~~

A97

BLOOM: Annette Bloom, Assistant Regional Attorney.

SCHMIDT: Ann-Marie Schmidt, Program Specialist, Office of Long Term Care.

SHARPE: Ronald Sharpe, Senior Sanitarian, Syracuse Regional Office, the State Health Department.

SULLIVAN: Bernard Sullivan, Senior Sanitarian, Regional Office [sic], State of New York Health Department.

WEINBERG: Michael Weinberg. I am an attorney representing both Case Nursing Home and Phillips Nursing Home.

REGAN: James P. Regan, Fire Safety Consultant.

SANGARO: Louise Sangaro, owner and administrator of the Phillips Nursing Home, Syracuse.

GLOSSING: Charles Glossing, Administrative Consultant and representative of the Case Nursing Home.

PIRODI: Bernard Piroda, HEW.

A98

BERKOWITZ: Thank you.

I will now call on Mr. Weinberg, counsel for the facilities, to make any opening remarks he wishes to make, and then to have him present whatever relevant material concerning these facilities' compliance with the Life Safety Code.

WEINBERG: Thank you, Mr. Berkowitz.

At the risk of starting off this afternoon on the wrong foot, off the record twice before we came into the office Mr. Berkowitz used the word "hearing." And I would like to state that it is the nursing homes' positions, both Case and Phillips, that this procedure is not a hearing and consequently does not comply with the requirements of due process.

We understand that under the procedure set up for this type of situation hearings are not available, and consequently we are here for the review.

We believe that if the waivers are going to be denied, that it must be done after a full administrative hearing with the necessary

A99

procedures for review, both under the Maxwell case and under the due process clause of the Constitution.

BERNOWITZ: The correct terminology is a review, Mr. Weinberg. And we are using this procedure in lieu of any other procedure under Title 19. There are no other procedures currently available under Title 19.

WEINBERG: We're aware of that. And we are here today for the review, and certainly intend to go through with the review.

On the other hand, if there is going to be a denial of waiver, we would like it done after a hearing, and we certainly are not waiving any rights we feel we have to a hearing.

BLOOM: You're free to make any objections for the record that you have. I'd just like to state that I'm sure counsel is aware that the requirements of due process vary in terms of proceedings. And what you may feel is a formal hearing procedure compared with this procedure may differ.

A100

WEINBERG: I'm fully aware of that and I'm also fully aware that we are not going to resolve that problem here today.

BLOOM: Okay.

WEINBERG: I suppose that except for Mr. Murray who has just walked into the room with Mr. Aronowitz, I've been as close to the Maxwell situation as anyone. I was clerking for the Federal District Judge who decided the Maxwell case when it first arose, and have been working with nursing homes in the Auburn and Syracuse areas since the Maxwell case was first decided.

By way of background I'd like to state what's happened to the Case Nursing Home and to the Phillips Nursing Home.

The Phillips Nursing Home had a hearing in Syracuse, and after the hearing it was determined that the Case Nursing Home should not be granted a waiver [sic]. An Article 78 proceeding was commenced in the Appellate Division Third Department -- [They] made a decision that was almost a non-decision.

A101

They -- at the hearing in the Phillips case -- found the recommendation of Mr. Regan -- who was testifying as the fire safety consultant and expert -- recommended that certain additions to the Phillips Nursing Home were made, and if these additions were made the nursing home would be reasonably safe for the inhabitants and would certainly not adversely affect the health and safety of the patients in the home.

The Appellate Division remitted or remanded the case for further proceedings to determine whether or not those recommendations had been complied with. And prior to the time anything was done by the State, all the recommendations were complied with and we were prepared to go ahead with the matter on a remand.

I use this primarily as an illustration. And I should also say that the same thing was true in the Case Nursing Home situation, except in Case no hearing officer ever showed up for the hearing; there was no sworn testimony, just

A102

a recording by someone who was there, by the attorney for the State. And based upon that non-hearing, the State did determine that the Case Nursing Home was not entitled to a waiver.

The Article 78 proceeding was never pursued on the lines that there was not substantial evidence to support the findings, but rather that there was no hearing in the first place. And rather than go through the appeal process, the State stipulated to a new hearing.

The hearing has been held, and there has never been a decision in that case.

At the hearing Mr. Regan again made the recommendation that certain things be complied with. And if they were complied with, the nursing home would be reasonably safe and the alternative arrangements would not adversely affect the health and safety of the patients.

Those recommendations were, again, complied with.

I use this as an illustration primarily

A103

to show that these nursing homes -- despite some of the adverse publicity -- are concerned about making their homes safe. Not only have they made the homes safe pursuant to court order, or, pursuant to recommendations of safety experts in this litigation and in the nursing home hearings in the State; but, throughout the years, whenever called upon, they have made the changes.

And I would like to point out one section in particular of the Life Safety Code of 1967 under which we are working, and that is Section 10 21-21, and 21-2 -- particularly 21-22.

In such cases the requirements may be modified by the authority having jurisdiction to allow alternative arrangements that will secure as nearly equivalent safety to life from fire as practicable. But in no case shall the modification be less restrictive or afford less safety than compliance with the corresponding provisions contained in the following part of the Code.

A104

Some of the following requirements are the same as for new hospitals and nursing homes.

And next to 21-22, there is an asterisk, and if you go to the Appendix, it says, in some cases appreciable costs may be involved in bringing existing occupancy into compliance. Where this is true it would be appropriate for the authority having jurisdiction to prescribe a schedule to determine jointly with the institution allowing suitable periods of time for the correction of the various deficiencies, giving due weight to the ability of the owner to secure necessary funds.

I think the Code, not only in this section, but in other sections where the Code speaks specifically of existing structures -- and when they talk about sprinklers, they are talking about existing wood frame two-story structures; when they talk about doors being forty inches, the Code also is careful to put in that existing structures which have doors of twenty-eight inches or greater can comply, it is a

A105

discretionary thing, with the local authority having jurisdiction.

But throughout the Code there is recognition that there are many existing nursing homes, and it is impossible to comply with every letter of the Code, but that alternative arrangements can be made, and this is something that can be worked out with the local authority having jurisdiction, in a plan to make the nursing home reasonably safe.

I think you'll find that also with the waiver provisions in the Social Security law and in the Code of Federal Regulations. I don't think it is an absolute thing; the waivers can be granted for a period of time, and, presumably during this time some of the corrections can be made.

We take the position -- and it is going to be impossible to sit here today and decide that some of our thirty-four inch doors are forty inches -- but there are some deficiencies, technical deficiencies, deficiencies under the

A106

letter of the Code that are in existence. But we feel except for changing the structure of the buildings entirely that the deficiencies that have been alleged, the ones that we are prepared to concede to exist, can be corrected.

So that the nursing home although we feel at the present time is reasonably safe -- and this is both the Case Nursing Home and the Phillips Nursing Home -- and that the arrangements that have been made at the present time and that have been made in the past do provide adequate safety for the patients, we feel that by making some of these corrections we can come within Code compliance, or as close to Code compliance as possible.

That is, simply, our position.

BERKOWITZ: Are you prepared to submit to our office a plan of correction, in writing, stating what deficiencies you are willing to correct and how you would make these corrections?

WEINBERG: Yes, I think we would be willing to do that, but in addition to that, as

A107

long as we are here, I would like to go through the list of deficiencies and also to go through some of the oral plans that we have. We have had estimates done; we have had plans drawn up, but if this is something that you'd like done by an engineer with diagrams and sketches to scale, this is something that we would have to submit; we are not prepared to do that today.

BERKOWITZ: We would like to see that in the future, in the very near future.

Please proceed.

WEINBERG: During the discussion of these deficiencies I will be calling on Mr. Regan both from the point of view of the discussion of the Life Safety Code, and also to discuss the plans of correction. Because these are plans of discussion which have been discussed with Mr. Regan previously and also with the administrators of the homes.

Do you want to do Phillips first?

BERKOWITZ: We will begin with the Phillips Nursing Home.

A108

WEINBERG: The first deficiency is that the rear stairwell gate is locked at the second floor and a door at the bottom is not a one-hour fire rated, and is not latched.

Certainly the lock can be removed from the second floor door. And the door at the bottom can be replaced with a one-hour fire rated door that latches.

The second deficiency is the stairwell door at the top of the front stair is not a one-hour fire rated, and is locked with sliding bolts. And I think that is just a correction of the door itself and does not require any major structural change.

The rear stairwell exits into the kitchen. And I think I'm going to ask Jim Regan to explain how that exits into the kitchen, and what we've talked about for an improvement.

REGAN: The rear stairwell enters into the kitchen. The distance from the stairwell to an exit is the width of one door. And we propose to

A109

put a partition, erect a partition to separate that portion of egress from the kitchen so that the rear stairwell will lead to an egress and not lead to the kitchen at all; it will lead directly outside the building.

WEINBERG: Mr. Regan, where the rear stairwell exits into the kitchen, is there anything there?

MR. REGAN: No.

WEINBERG: Are the stove and the other appliances in the kitchen separated from this area, sir?

MR. REGAN: Yes.

WEINBERG: Is there a clear path at the present time, unobstructed and not near any hazardous devices?

MR. REGAN: Yes.

WEINBERG: All right. The front stairwell exits into a lobby office which is unenclosed. Would you explain what we are going to do with that?

REGAN: We are going to enclose that lobby by putting the required rated doors in all

A110

openings to that lobby so that the lobby would be a legitimate means of egress.

WEINBERG: The next two alleged violations: the exit door from the kitchen swings inward and is locked by two sliding bolts -- Again, I think all that this is a question of is rehang- ing the door so it swings outward.

And the inner front exit door swings inward -- And I think there too it is just a question of making that swing outward instead of inward. And I don't think that, again, is any major construction problem. It is something that could be remedied.

The next alleged non-compliance: There is no corridor on the first floor providing access to two exits remote from each other. Passage is from patient room to get to front from rear of house. And the provider cannot provide a plan of correction.

I don't think this is a -- I'm not disputing the first sentence or first two sentences. I do think there is a plan of

A111

correction. Before I ask Mr. Regan to explain what we have talked about in terms of correction -- As you walk into the Phillips Nursing Home there is a lobby that goes directly into a patient room, and the patient room leads to the kitchen area. It's not directly into the kitchen but it's into the area that leads to the kitchen.

Jim, could you explain the way that this alleged deficiency can be corrected?

REGAN: We're going to remove one bed from that area and erect a partition separating the existing beds from the existing partition so that there will be a continual run of corridor from the front to the rear of the house.

There is another egress other than the kitchen on your right-hand side as you pass through this patient room, which would be our second means of egress of patients from the first floor.

WEINBERG: The second floor corridor is thirty-seven inches in width, not the required forty-eight inches. We measured it and came

A112

somewhere in the area of thirty-seven inches.

Jim, can you explain the reason why Section 22-23 was set up for forty-eight inches?

REGAN: Yes. Ordinarily -- the section was set up for the movement of hospital beds and the movement of patients on mattresses or litters. That was the rationale behind that.

We do not handle our patients on hospital beds, we do not handle them on mattresses or litters -- we use blankets in the event of evacuation. So therefore the forty-eight inch requirement corridor or the forty inch requirement for a doorway should not apply to us.

WEINBERG: And again, if this is not a provision that can be waived, it will mean a total restructuring of the whole building. It is probably going to be an impossibly costly thing to expand the corridors to forty-eight inches. On top of that it will probably mean cutting down the size of the bedrooms to the point of where they would be in violation of some code.

A113

The first floor bedroom egress is through adjoining bedrooms. I believe the Code does provide that you can have egress through one adjoining bedroom. I don't believe there is an egress through anything more than one adjoining bedroom. And I think that with the partition in the bedroom we were talking about before, and the making of a corridor, there will not even be this -- there will not be the need to go through a bedroom; is that correct?

REGAN: That's correct.

WEINBERG: The second floor doors are thirty-two inches in lieu of the required forty inches. Again, is the reason for this the same?

REGAN: The same reason.

WEINBERG: And is there a provision in the Code for doors less than forty inches in existing structures, Mr. Regan?

REGAN: Yes; any door previously installed, at least twenty-eight inches wide may be accepted.

WEINBERG: Number three, seven. The doors

A114

are wood panel in lieu of the required one and three quarter inch solid wood bonded core or equivalent, and these doors can be replaced by the one and three quarter solid wood bonded core.

Jim, this facility is wholly sprinklered?

REGAN: Yes.

WEINBERG: And any other devices for fire protection?

REGAN: There are combustion detectors in the corridor.

WEINBERG: For the present time until these new doors -- what, from the fire safety point of view, would be the difference between the one and three quarter inch solid wood bonded core doors and the doors that are currently there?

REGAN: In a sprinklered building?

WEINBERG: Yes. And what is the reason for that?

REGAN: The reason --

BERKOWITZ: I didn't hear that, could you repeat that, please?

WEINBERG: Yes; I am asking, in a fully

A 115

sprinklered building, the difference between the one and three quarter inch solid wood bonded core door and the doors that are currently there in the Phillips Nursing Home. And Jim, I believe, responded "None," and I was asking him the reason.

REGAN: The reason being that a sprinkler system operates at one sixty-five degrees, and wood will not burn below four hundred. So in order to burn through a door you must have sufficient heat to kick off the sprinkler system. And it has been demonstrated in any health facility where a sprinkler system did not extinguish a fire before a door was burned through we have a panel door and the other type of door.

And the one and three quarter inch door is permissible in a building that is not sprinklered, where you have nothing to extinguish a fire.

Now there would be a difference in that type of building between a panel door and a solid wood core door. One would hold back fire longer. But in a sprinklered building your sprinkler system would extinguish the fire.

A116

VOICE: What you're saying is that because of the sprinklers the requirement for a one and three quarter inch door is not necessary.

REGAN: That's right.

VOICE: But you're not saying that the Code or the regulations do not require a solid core door.

REGAN: I did not say that.

VOICE: Okay.

REGAN: The Code says that any door -- "any" door twenty-eight inches in width -- it doesn't say any one and three quarter inch door.

VOICE: But the State of Utah has already requested a clarification of this -- just this subject in Washington, and been told the equivalent of a one and three quarter inch solid core door is required.

WEINBERG: Now, assuming that it is required --

VOICE: I think it was the State of Utah Fire Marshall asked for a waiver of that, just what you are talking about, sir.

A117

WEINBERG: Assuming that it is required, are the present doors -- and I'm not talking about the accordian doors but I'm talking about the wood doors that are up -- are they reasonably safe from the fire safety point of view?

REGAN: In my opinion they are.

WEINBERG: Going on to the second page:

Room nine has an accordian type door, and there are a couple of other rooms without doors. And there are four sliding doors on the first floor. These doors can be changed and would be changed.

The next, five-eight: The doors open directly on the stairs.

I believe, Jim, we did discuss the installation of a small landing at the top of the stairs. And we have had a contractor come over to give us an estimate on the installation and moving back the doors so there could be landings at the top of the stairs. But from a fire safety point of view what is the use of the landing at the top of the stairs?

A 118

REGAN: None. It's superfluous.

WEINBERG: The two-story wood frame building, I'm afraid there is very little we could do about the absolute of construction, other than covering any exposed places with --

REGAN: With gypsum.

WEINBERG: -- with gypsum.

The front stairwell is not enclosed.

Jim, could you explain the Code requirements on that?

REGAN: The Code requires full enclosure. But full enclosure not being practical, it requires an enclosure that will restrict the spread of fire from floor to floor. And we intend to install a fire door at the top of the stairwell because you can't put an enclosure in that building. A fire door would stop the spread of fire from floor to floor.

WEINBERG: The main sprinkler valve requires electrical supervision to sound the alarm when the valve is closed. [Sic] Is there anything, a simple anti-tamper device to take

A 119

care of that?

REGAN: We're going to install an anti-tamper device.

WEINBERG: The last three: The draperies and curtains flame-retardant. I believe that is something that can be changed relatively simply.

The draperies are, as I understand all fiberglass and are flame retardant. There may be some curtains, and they will be taken down [sic].

The waste paper baskets can of course be replaced by noncombustible waste paper baskets.

And the housing of non-ambulatory patients on the second floor is not allowed because the construction is wood frame.

Jim, do you interpret the Code as not permitting non-ambulatory patients on the second floor?

REGAN: It doesn't mention non-ambulatory patients any place.

WEINBERG: From a fire safety point of view is it permissible to have non-ambulatory patients on the second floor in a fully-sprinklered building?

A 1210

REGAN: Yes, it is.

WEINBERG: And does your interpretation --

BERKOWITZ: I would like to ask Mr.

Pachillo if he could comment on that.

PACHILLO: In a building that is not fire resistant you can't have non-ambulatory patients above the street level. At least I've always been under that impression.

REGAN: Does it so state in "101"?

PACHILLO: It's stated in policy from Washington. It's in the Register, it's in the Federal law.

REGAN: Federal law permits it in protected wood above the first floor, in fully sprinklered buildings.

PACHILLO: "Protected?"

REGAN: Yes, sir.

PACHILLO: Are we talking "protected?" I thought we were talking two-story wood frame.

REGAN: I'm saying that the Federal code refers to "protected."

PACHILLO: I thought he said two-story wood

A121

frame, what we're talking about.

REGAN: This is a two-story wood frame facility, wholly-sprinklered.

PACHILLO: That is not a two-story "protected" building. There is a difference.

WEINBERG: Without getting too technical, the list of deficiencies as stated on this list that was given to us were violations or alleged violations of the Life Safety Code of '67, and, quite frankly I didn't find that in the Life Safety Code at all. And --

PACHILLO: I don't believe you'll find that in the Life Safety Code. But of course you have to remember we're bound by regulations as promulgated by Congress, and these are Social Security, Title 18 and Title 19 regulations which appeared in the Federal Register in February '74. And the Registers before that, when the Law came out.

Now the NFPA addresses itself to Life Safety. But we're bound in looking at it all totally, to the health and safety of the patients in

A122

the facility.

VOICE: I'll give you the reference if you want under the Federal Register; it's 405-11.34.

BERKOWITZ: Could you state the date of issue of that, please?

It's on the front, if you have it.

VOICE: These are just my notes.

PACHILLO: It was issued in February '74. I know the volume number. It's Volume 33. I don't know it in full, the Federal Register number. But the newest regulations are '73-'74.

What is it, January '74?

WEINBERG: Mike is that 405-11.33, parentheses "A?"

VOICE: No; 11.34.

WEINBERG: Eleven thirty-four?

And if we take a break a little later I'll --

BERKOWITZ: We can have one now.

WEINBERG: Can I have a couple of minutes?

BERKOWITZ: Yes.

(Discussion off the record.)

WEINBERG: This is 405.1134 (A). And Jim,

A123

are you of the opinion that non-ambulatory patients under this section can be placed on the second floor of the nursing home?

REGAN: I think when we put up our gypsum, I think we'd be protecting it.

WEINBERG: That's gypsum just covering the joists, the exposed joists?

REGAN: Yes.

VOICE: This then will be a matter for full review after the plan of correction is submitted.

VOICE: You will be submitting this, right?

WEINBERG: Yes, we will.

And, finally, there is no emergency electrical generator to provide electrical service to life support systems.

REGAN: It's not required with less than thirty people.

WEINBERG: I think, although this next couple of questions that I want to ask Mr. Regan would apply to both nursing homes, I would like to ask him while I still am on the Phillips Nursing Home: When you, Jim, are considering a

A124

nursing home, whether it's safe or unsafe from the fire safety point of view, do you look only at the compliance with the Life Safety Code?

REGAN: No.

WEINBERG: What other factors do you take into consideration?

REGAN: I look at the exterior of the building to see what parts of the building are accessible to portable ladders; see if the building can be ventilated from the outside.

WEINBERG: And how about the Phillips Nursing Home?

REGAN: The Phillips Nursing Home is accessible on all four sides and can be vented from the outside.

WEINBERG: And how about the nearness to a fire department?

REGAN: I take into account the running time, the ordinary running time of a fire company, the nearest fire company. And at Phillips I believe the running time is between two and three minutes for the nearest company.

A125

WEINBERG: And Mrs. Sangaro, correct me if I'm wrong -- I believe the nearest fire station -- which is a paid fire company -- is two blocks from the home?

MRS. SANGARO: Yes.

WEINBERG: And the nearest fire hydrant is less than a block away?

SANGARO: One block.

WEINBERG: You've been in the Phillips Nursing Home obviously. Do you think that any of the items that we've discussed today as plans of correction would present any problem in terms of actually completing them?

REGAN: No.

WEINBERG: At the present time do you have an opinion on the safety of the facility and its patients?

REGAN: Yes, I do.

WEINBERG: What is that opinion?

REGAN: I think the patients are relatively safe in that building, as is.

BERKOWITZ: Mr. Weinberg, were plans of

A126

correction ever submitted to the State before?

VOICE: I don't know whether I'm supposed to jump in here or not according to the rules of this review or whatever you're calling it.

BERKOWITZ: If you have no objection.

WEINBERG: None.

VOICE: I have in my possession here a plan of correction which was submitted by Phillips Nursing Home to the Regional Office, State Health Department of New York.

BERKOWITZ: When?

VOICE: Well, the survey was done in 12-27, 1973 and sometime during '74 Phillips Nursing Home had answered each and every one of the deficiencies with some comment, as required by --

WEINBERG: Well, I'm not disputing this. Plans of correction which have been submitted -- these engineering standards -- are certainly something which we can do within a relatively short time.

Again I go back to the basic premise under which these nursing homes are operating. As an

A127

attorney I would tell any nursing home that I'm representing not to put any money into the home unless waivers are going to be granted or unless there is a chance that waivers are going to be granted. It's an awfully difficult thing -- and in some of these homes some of the major construction changes are going to run into a lot of money. And I'm sure everybody can understand that a nursing home is not in a position to invest a few thousand dollars or ten thousand dollars only to learn that -- a month later -- waivers aren't going to be granted or they're going to be facing an Article 28 proceeding to have their operating certificate revoked.

I know that Phillips Nursing Home and I know that Case Nursing Home are more than willing to do everything reasonable and everything possible to make their homes comply as closely as possible with the Code, as long as they have the assurance that when they get this done they are going to be staying in business.

A128

BERKOWITZ: The procedure which has been followed in the past with these reviews is that whatever documentation counsel or operator of the facility wanted to submit to us was submitted within a reasonably short period of time -- ten days to two weeks. At that time the architects and engineers at HEW in conjunction with State people -- but the decision, of course, being with HEW -- would be reached as to whether or not to grant waivers, and the operator would be so notified.

WEINBERG: Now, as long as we are on the record, this is again something that I talked to you about off the record before.

Is it my understanding that when plans are submitted that they will not only be reviewed from the point of view of seeing whether the plans would conform and comply to the letter of the Code, but if ideas can be presented by the engineers of the State and the Federal government reviewing them, those ideas can be presented so that the home and the government

A129

will work together to try and comply?

BERKOWITZ: Definitely. That is a correct assumption.

May I ask you one other question?

Have you any idea at this time as to the approximate cost of making these?

WEINBERG: I can give you approximate costs but not exact costs.

Approximately four thousand dollars in Phillips Nursing Home.

BERKOWITZ: How about a time frame for completing the work?

WEINBERG: I can't give that to you today, although it will be done as quickly as possible.

I can say this: After the State hearing in Phillips Nursing Home Mr. Regan recommended three things be done. He recommended that smoke protection had to be placed in the corridors of the premises and products-of-combustion heads were placed there, that -- Mr. Regan feels that these were superior to smoke detection heads; that some manual alarms

A130

be installed and that the third exit, which had been partially started, be completed.

You'll have to excuse me for one minute, I'm just checking on the dates.

I know that the hearing was -- we made the offer on October 26, '72, and within a month all of these things were done.

And I'm not saying -- it's an impossible thing to predict how fast the contractor will go in and get it done. But certainly the hiring of the contractor, somebody who is going to do the work efficiently and promptly, would be done, and presumably it could be done as quickly as possible.

I don't think I can give you anything more definite than that.

BERKOWITZ: Would you be in a position within the next ten days to two weeks, when you will be submitting a plan of correction, of having a time frame?

WEINBERG: I could.

But, again, this is something that would

A131

require discussion with the people doing the work to see what their time schedules are, or, to find people who are not busy at the present time to see how quickly it could be done. It's just something I can't do today.

BERKOWITZ: Any idea -- getting back to the plan of correction of December 7th and December 27th -- the surveys of December 7th and 27th, 1973, as to why the plan of correction states "unable to conform?"

WEINBERG: No, I do not.

VOICE: Which are you referring to?

BERKOWITZ: I'm sorry; Phillips.

Some of the deficiencies which are listed here which you described as easily correctable as to changing things, had been marked "can't conform."

Okay; anything else?

VOICE: I'd like to respond to that statement. I think it implies -- both Phillips and Case, we got notification -- when I say "we," both nursing homes received this through the

A132

correspondence of a Frank Perth, M.D., Assistant Regional Health Director, New York State Department of Health. And I'd like to read from that correspondence a -- a statement which says, regarding the items we are talking about:

You are hereby notified that any construction, alteration or improvement without required approval, as above stated, would be made at your own risk and would not be reimbursable.

So this has made us cautious in making any intended alterations, for the obvious reason.

WEINBERG: And I think also -- at least from my point of view -- and I quite frankly don't remember ever seeing this plan of correction submitted by Phillips Nursing Home -- Unlike probably the vast majority of nursing homes we were hanging in Phillips in the Appellate Division, and I can say -- and I'm certainly not giving an opinion on the correctness of the decision, but Phillips Nursing Home in a motion to vacate the order remitting -- it was just granted -- being a feeling that the

A133

State proceeding is academic. I'm not convinced that the State proceeding is academic, at least from the point of view of requiring the State of making a recommendation to the Department of Health, Education & Welfare that the nursing home should be granted a waiver, whether it's done under court order or whether it's done otherwise.

And, of course, in the Case Nursing Home we will haven't had a decision. And I think there would be a great reluctance to do anything without having a decision in the earlier State hearings; until everyone knows where their hearings are.

BERKOWITZ: Anything?

BLOOM: No; only that our position at HEW on the Life Safety Code waivers is that it's a fully completely Federal matter at this time and that while the statutes and regulations provide for the State agencies to survey and to make recommendations to HEW, that is merely a recommendation to HEW.

VOICE: The final authority rests with HEW.

A134

BERKOWITZ: If you have no further material to submit on Phillips, in summary I'd like to state that we can look forward to receiving from you a plan of correction detailing each of the deficiencies and what can and will be done to correct them, with a time frame wherever possible.

WEINBERG: Before we answer that question can we go off the record and can I have two minutes of talk with --

BERKOWITZ: Sure.

(Discussion off the record.)

BERKOWITZ: For the record, Mr. Weinberg has stated that the Office of Long Term Care will be receiving within the next thirty days a plan of correction for the deficiencies cited by the survey.

Included with the plan of correction will be the estimated costs for making the corrections as well as the time frames for completion of the work.

At this time, Mr. Weinberg, would you like

A135

to discuss the Case Nursing Home?

WEINBERG: Yes, I would.

Again in the interest of making what is otherwise -- at least in my judgment -- has been a profitable afternoon a boring one, I will not discuss anything further in connection with Case except to go through the list of deficiencies and the plans that we have discussed.

And I would like to use the same format, that is, some of the simpler things that a lawyer can verbalize I will simply discuss; otherwise I will turn it over to Mr. Regan.

The two-story wood frame construction:
Again, this is something that all we can do is to provide alternatives in as many other respects as possible to come as close as possible in compliance with the Code.

The corridor walls on the second floor, plaster walls fire rated less than the one-hour fire resistance. In connection with this, I am wondering if I could ask one of the people who made the survey how that determination

A136

was made?

BERKOWITZ: Are you speaking about "27"
now?

WEINBERG: I am talking about plaster walls
fire rated less than one hour fire resistance.

BERKOWITZ: What is the survey date?

Did you do that?

SHARPE: Yes; I'm Ronald Sharpe; I did it
before. Senior Sanitarian, Syracuse Regional
Office.

VOICE: Mr. Pike surveyed that.

VOICE: Mr. Pike surveyed; correct.

(Discussion off the record)

WEINBERG: To make a long story short, I
think if we can get the wall tested to see if it
is one-hour fire resistant, fine. If it is not,
I believe that we are prepared to put up one hour
gypsum board on the walls.

BERKOWITZ: Mr. Pachillo, would you do me
a favor and repeat your statement as to the
assumption that was made, in case we missed that?

PACHILLO: Well, I'm making the assumption

A137

that the fact that the surveyor went up there -- and since the building is, what? fifty, sixty years old?

VOICE: Seventy-five.

PACHILLO: Okay. That to go to the Underwriter listing laboratory tests today you wouldn't find that detail of construction in the listings.

Now, I'm not making the further assumption that it is not possible that the existing wall -- if it's tested -- does not meet, like you just said -- It's possible. But I'm making the assumption that that is why the man did say it is not a protected wall.

The proof is not there that it does meet the one hour requirement, is what I am trying to say. Okay? If it was two half metal studs with five eighths gypsum board on each side, today we know that's a tested detail. Therefore it's a one hour wall. We know this.

In this case the man racks his brain and doesn't know of any test and so he says "not met."

BERKOWITS: Okay.

A138

WEINBERG: Number two, through the corridor; doors not being one and three quarter inch solid wood bonded core or the equivalent as required; again, this is something that we discussed in connection with Phillips. Unless you want to go through that again, I --

The stairways are not enclosed, with partitions having one-hour fire resistance ratings. Jim, on that?

REGAN: Well, the stairways are not enclosed with partitions having fire resistant ratings, but we are going to put rated doors at the top of each stairwell to prohibit the passage of fire from floor to floor.

PACHILLO: And on two dash three, you will replace the door?

WEINBERG: Yes.

Three, one: On the stairs, the secondary stair from first to second floor are not Class B width of thirty inches, risers eight and a quarter inches, treads eight inches.

REGAN: We can't make a Class B stairway.

A139

Only thirty-six inches. And the Code says that any stairwell previously installed may be accepted.

WEINBERG: I think under that one we would probably ask for a waiver of that requirement and if there is an alternative -- without a complete reconstruction of the building -- I'm sure we would be willing to do it.

The dumbwaiter shaft not protected by partitions having at least one-hour fire resistive rating. Jim?

REGAN: I believe they are. I believe those shafts have linings in them that would constitute one hour. In addition to which the shaft has a sprinkler head in it.

VOICE: Excuse me, you say "lining."
What type of lining would that be?

REGAN: I believe it's gypsum or sheet rock.

PACHILLO: Can I go off the record?

BEPKOWITZ: Yes.

(Discussion off the record.)

A148

WEINBERG: The next one does require a little explanation, and there are some plans. The interior stairs lead through the lobby-office-sitting room combination; other, through kitchen. Jim, if you can explain the configuration of the building?

REGAN: The front stairway leads to a lobby that leads directly to an exit. The rear stairwell leads to a corridor that terminates in the kitchen. We are going to, in that corridor, we are going to breach the exterior wall and put in a stairwell so that the secondary stairwell will exit directly to the outside of the building. It will no longer be necessary to go through the kitchen.

And I believe a lobby is an acceptable means of egress from a building.

WEINBERG: And I noted before that we -- The corridor widths less than the required forty-eight inches; again, in some spots I believe they go up to forty-seven inches and if I can just rephrase what Mr. Regan said

A141

before, apparently the Code was designed so that the forty-eight inches would be adequate for hospital beds and stretchers going through, but the Case Nursing Home does not use that means of evacuation, and the narrower corridors are adequate.

Is that a fair restatement?

REGAN: Yes.

WEINBERG: The rear bedroom first floor, exits through the kitchen.

Jim?

REGAN: We're going to provide egress for that bedroom so it will not go through the kitchen.

WEINBERG: And this would be done how?

REGAN: I'd have to see a sketch of the first floor.

WEINBERG: I have a sketch, but I'd rather -- Here it is.

[Mr. Regan examining.]

REGAN: We're going to put an exit from the room directly to the outside of the building.

A142

WEINBERG: I don't mind marking this as an exhibit if I can have it back when we're done today, as long as we are going to be submitting detailed sketches.

BERKOWITZ: Yes.

WEINBERG: This is the first floor of the Case Nursing Home and where the stairwell leads down through what is now the kitchen there is a showing of -- it's not marked as a proposed exit, but the proposed exit would be here, and also the proposed exit from the bedroom that does have to exit through the kitchen, over here (indicating).

BERKOWITZ: We'll just make a copy of it and pass it right in.

WEINBERG: Sure.

BERKOWITZ: Are you going to cover four dash two?

WEINBERG: Oh, right; I thought maybe if there were any questions about the drawing.

The patient rooms are twenty-eight to thirty inches in lieu of the required forty

A143

inches. Again, I believe that a complete reconstruction of the building to provide for forty inches for these doors may be impractical, and I also believe that the Code does authorize a waiver of the forty inch requirement in existing structures if the doors are at least twenty-eight inches wide. And this is something we would seek a waiver for, especially in view of the evacuation procedures used in the Case Nursing Home.

The stairwell doors do not have signs indicating fire exit, keep closed. We will put up signs saying "fire exit, keep closed."

The non-automatic emergency lighting, Jim?

REGAN: I mentioned that auxiliary is not required in a building with thirty or more patients under the "101."

PACHILLO: You have to have battery packs at the exits, though. In illuminating the exits. Don't you, according to the "101?"

REGAN: No.

PACHILLO: I'll double check.

A144

REGAN: It says type one, two or three emergency lighting.

PACHILLO: Yes, but battery pack acceptable -- the automatic -- All right, we'll check into it.

We're talking battery packs; it's no big deal.

WEINBERG: The main sprinkler control valve not electrically supervised. Again, this is an anti-tampering device that we are prepared to install.

The ventilating equipment: The kitchen range is not equipped with an exhaust hood. And I think the survey report shows exhaust hood with automatic extinguishing devices, and that we're prepared -- The evacuation plans are not posted; they certainly would be posted.

The furnishings and decorations obstructing the exits, we can remove them so that they do not obstruct the exits.

The draperies and curtains -- Chuck, do you want to answer that?

A145

GLOSSING: We have changed the curtains and they are of fiberglas material which is non-combustible.

PACHILLO: Can we go back to six dash eleven for a moment? Furnishings and decorations obstructing exits. Has that been corrected already?

WEINBERG: Yes, it has.

GLOSSING: It was a matter of some chairs and a television -- we used as a small TV room. I refer to Mr. Sharpe, because he also did a survey where he [indistinct six, seven words]; it was his recommendation, too.

WEINBERG: And the waste baskets will become non-combustible, presumably by purchase rather than metamorphosis. [Laughter.]

Again, the other things that I would ask Jim, and I am sure that the response would be the same as to the Phillips Nursing Home, that to determine the safety or non-safety of a nursing home there has to be more than just a look at the compliance with the letter of the Code. Again,

A146

all four sides of the building are accessible through portable ladders; the nearest fire station is four blocks away -- one down, three over?

GLOSSING: Right.

WEINBERG: And it is a paid, city fire department.

Shingled roof, which makes ventilation easy. And anything else?

BERKOWITZ: Do you have any idea of costs for these corrections?

REGAN: A lot of money.

BERKOWITZ: Pardon?

WEINBERG: A lot of money.

PACHILLO: Well, this would be contained in your reply.

WEINBERG: It would be contained in our reply. The estimate that we have shows it to be about ten thousand dollars -- ten to fourteen thousand dollars. Of course, some of the things in here I ask for estimates even though I would ask for a waiver, and hope the waiver would be

A147

granted. And these estimates were not prepared with the view of having the job done within the next few months. They were separately itemized, and I'm sure that somebody doing the complete job is going to have one price for a total job and it's not going to be broken down. So I don't want to commit on a price.

Again, I say ten to fourteen thousand. It is probably going to be a lot less.

BERKOWITZ: Were any plans of correction submitted previously to the State Health Department?

GLOSSING: Prior to my coming as administrative consultant to the nursing home I believe that there were -- in a survey done in 1973 by Mr. Weinstein, if we're talking right now in terms of structural deficiencies. I think I have a copy of that in my office. I don't have it with me. It was done by the previous operator -- Well, previous administrator.

BERKOWITZ: Will we be receiving the plan of correction regarding the Case Nursing Home within the same time frame, thirty days?

A148

WEINBERG: Yes. With supporting material.

BERKOWITZ: As to costs, supporting material and time frames for completion of the work.

WEINBERG: Right.

BERKOWITZ: Did you have anything else, any questions you would like to ask either the State or Federal people?

WEINBERG: I don't think so.

BERKOWITZ: Is there anyone else who would like to add anything?

I'd like to state before we close -- as I stated to you before we began these proceedings, that it is not the intent of the Department of Health, Education & Welfare to either withhold funds or terminate facilities from the programs, either Title 18, or denial of waivers under Title 19, and advise the State thereof.

It is the intent to render nursing homes as safe as possible. And where possible -- where necessary, we stand ready to work with the administrator, operator of the facility, the

A 149

State Health Department, in providing whatever technical assistance we can to correct deficiencies so that the facility is safe, and that the patients are protected.

WEINBERG: Before we close -- this can be off the record, or, we can stay on the record:

It's my understanding that within the next thirty days we will be submitting plans -- plans of correction along with sketches, estimates and time schedule, and at that time they will be reviewed by people in your office?

BERKOWITZ: That's correct.

WEINBERG: After that review, assuming that there are things that your office feels could be improved or things that are totally improper in your opinion but can be done in another way, is it my understanding that somebody in your office will be back to us to tell us the results of the review of our plans before any decision is made?

BERKOWITZ: Yes; that is correct.

WEINBERG: And if possible, a plan would

A150

be worked out, or am I going too far?

BERKOWITZ: Would you like to describe what happens with this, and if there would be an item on the plan of correction which in your professional opinion wouldn't satisfy -- provide a satisfactory solution to the problem, what give and take there would be?

PACHILLO: When the itemized deficiencies -- when these cannot be corrected -- we're going to have to go over the reply.

Okay, let's assume, weed out the ones that they can do, okay? But there are one or two that they ask for a waiver on that we have a decision to make. What we will endeavor to do is, if we can accept it, to flat out tell you so or tell you how we can accept it. If we cannot accept it, you will so be told, too. Then the next step, we will proceed, whatever that may be.

BERKOWITZ: Okay?

PACHILLO: And I mean the reply, I assume, will be coming from your shop, not from us.

A151

directly. We'll reply in kind to Long Term Care and then I assume Alan will be sending the letter out.

WEINBERG: The type of thing that I am questioning is --

BERKOWITZ: I think your question was that if there is something that is submitted which does not satisfy the deficiency, which would not correct the deficiency, do we have any ideas as to how it could be --

WEINBERG: Well, that's what I tried to say.

PACHILLO: If we think it can be satisfied in a certain manner, we will tell you this. If we do not think -- or do not accept the reply at all, we will tell you this as well.

BERKOWITZ: Okay?

WEINBERG: I think that answers my question.

BERKOWITZ: If there are no further comments or questions, then I will adjourn this review.

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A152